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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1250

HERMAN TANN, DAVID TANN, GEORGE TANN, LEE TANN, ALBERT TANNER and EDNA CHOSID, co-partners d/b/a THE TANN COMPANY, a co-partnership, and THE TANN COMPANY, a Michigan corporation,
Petitioners,

vs.

GEORGE H. HUMPHREYS, Administrator of the Estate of John S. Humphreys, deceased, and GEORGE H. HUMPHREYS, individually,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. As unanimously found by the Court of Appeals below in reversing the district court: Where (a) the plaintiff-respondent, Humphreys, was not a party to, nor directly or indirectly participated in the action or trial of *Downey v. TWA and Tann,* nor privity

with any party thereto; and (b) was represented by separate counsel acting independently and pursuing a separate course and theory; and (c) there is no separate or different Federal Rule of Collateral Estoppel; and (d) dismissal by the district court of the Humphreys action herein on the ground of collateral estoppel constituted a denial of due process of law, and was erroneously based upon the verdict of the jury in the Downey action in finding in favor of Downey against TWA (the prime target), and dismissing Downey's claim against Tann, *Whether* the decision of the Court of Appeals below was error in reversing the district court?

2. Whether the Petition meets the requirements of Rule 19 of the Rules of this Court?

Note: As would appear from the above, and as hereinafter demonstrated, the decision of the Sixth Circuit is fully in accord with the various decisions of both the State and Federal courts that collateral estoppel will not be applied against a stranger or where it would constitute a violation of due process. It is respectfully submitted that the so-called "Questions Presented" by the Petitioner are spurious, that there are no genuine issues requiring the intervention of this court. As to number 1, there is no separate so-called "Federal Rule of Collateral Estoppel", involved here, and if such a separate rule existed, it necessarily would be the same in principle as the state rules and it would not change the basic due process requirement. As to number 2, the assumptions of fact are misstatements not in accord with the record nor

with the findings of the Sixth Circuit, and in any event are immaterial, since they cannot be substituted for the requirements of due process or the mandatory elements of collateral estoppel.

RESPONDENT'S STATEMENT OF THE CASE*

This is a diversity action for damages for wrongful death on behalf of the widow and two infant children of John Humphreys, who was killed while he was a passenger on a TWA DC-9 aircraft on a descent to land at Dayton, Ohio, when it was struck in mid-air by a Beach Baron light aircraft owned and operated by the defendants-Petitioners, Tann Company, et al. (Tann). The complaint, alleging claims based upon the laws and statutes of Ohio, the situs of the crash and death, demanded a trial by jury. (A. 160).

It was filed in the U.S. District Court in Detroit, Michigan, solely against Tann by the father of the decedent in his individual and representative capacity as administrator, C.T.A. of the decedent's estate. After issue was joined the action was temporarily transferred to the U.S. District Court in Dayton as a "tag-along action" in connection with Multidistrict discovery proceedings being conducted by District Judge Carl A. Weinman, to whom passenger actions from different parts of the country variously pending against TWA, Tann and the U.S.A. had also been transferred for "the purpose of coordinated or con-

*Substantially as found by the Court of Appeals below.

solidated pretrial proceedings as provided in the order of the Multidistrict panel." 310 F. Supp. 798. Joint discovery proceedings involving these actions by way of depositions of the defendants, and third party witnesses were thereafter conducted, principally in Dayton, in which Humphreys' counsel participated only for the purposes of discovery. After the depositions had been completed, one of the cases, *Downey v. TWA and Tann*, pending locally in the U.S. District Court in Dayton, was tried in that Court before a jury, Weinman, D. J. presiding. A jury verdict was duly returned in favor of the plaintiff, Downey against TWA, but dismissing as to co-defendant, Tann. At no time did the plaintiff herein or his sole attorney, the undersigned, directly or indirectly, become a party to, nor participate, nor agree to be bound by, nor be represented in the Downey trial or in the pre-trial conference relating thereto, nor does the record show anything to the contrary. No order of transfer of Humphreys from Detroit to Dayton for other than Multidistrict pretrial purposes, or for consolidation for trial with Downey, was ever made or issued herein. Nor was it ever agreed that *Downey* be a test case.

Nevertheless, sometime after the *Downey* trial and verdict, the attorneys for Tann moved before the Multidistrict Judge for Summary Judgment dismissing the Humphreys' complaint on the ground that Humphreys was collaterally estopped by reason of the jury's verdict in favor of Tann in the Downey case. The motion was vigorously opposed by Hum-

phreys' counsel by way of filed brief and oral argument. The district court below granted the motion notwithstanding an admission in its thirty-three page opinion that its "decision does not conform to the weight of authority" and its failure to cite a single supporting authority. (A. 35).

Note: Petitioner's statement of the case is replete with inaccuracies and unfounded innuendos, all unsupported by the record and in contradiction of the findings of the Court of Appeals. The fact is that the *Downey* action was tried alone by District Judge Weinman because it was the only locally pending action and the only one of which Judge Weinman had trial jurisdiction as he stated, after he refused to join outside suits into the *Downey* trial for that reason (A. 67, 64, 113, 116, 119) saying that only *Downey* would be bound (A. 117). See also opinion of Court of Appeals. (p. 671.)

It is respectfully submitted that Petitioners' reference to prior partial recoveries from TWA or the U.S.A. is improper and obviously made for prejudicial purposes. Respondent is constrained to say that he is prepared to prove damages substantially in excess of the amounts separately settled for.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals (487 F.2d 666) in unanimously reversing Judge Weinman found:

1. That Humphreys was transferred from Detroit for Multidistrict discovery proceedings only, was not

consolidated with Downey, nor was there any agreement that it serve as a test case. (p. 667).

2. That the issue of Tann's liability to Humphreys was not submitted to the Downey jury. (p. 668).

3. That there is no evidence of the existence of a separate body of federal law of collateral estoppel nor that it is different from the law of Ohio. (p. 688).

4. That the district court stated it would only try the cases originating in its jurisdiction and return the rest to the courts of their origin; that no cases other than the Downey plaintiffs would be bound by the outcome of the Downey trial. (p. 671).

5. That the doctrine of collateral estoppel may be applied only against a party to the prior judgment, or a privity to such party, citing among other authorities, the recent decision of this court in *Blonder-Tongue v. University of Illinois Foundations,* 402 U.S. 313, 329, where the rule was explicitly restated by Justice White. Humphreys was neither a party nor a privity.

6. That the concern of the district court to summarily dispose of cases and relieve the dockets of the federal courts cannot overcome the due process requirements which were violated by the district court. (p. 672).

THE DECISION OF THE DISTRICT COURT

The thirty-three page opinion of the district court reported at 350 F.Supp. 757, was primarily concerned with an elaborate attempt to erect a facade (unsup-

ported by and in fact contradicted by the record) of fair dealing in order to obscure and overcome the plain requirements of due process of law. Despite it misplaced zeal to accomplish a disposition of the last of the Multidistrict cases before it, it was obliged to admit its dismissal of the Humphreys case had no basis in law when it finally summed up its 33 page argument:

> "The Court realizes that this decision does not conform to the weight of authority and appreciates that there is room for reasonable divergence of opinion as to the validity of the result reached herein." (p. 768).

The essence of the district court's curious attitude was before illustrated when, apparently recognizing the legal obstacles to throwing the plaintiffs out of court, it frankly admitted to Humphreys counsel during the oral argument: "*If I can find a way to do it, I am going to do it.*" (Emphasis added) (A. 156).

REASONS FOR DENYING THE WRIT

I

THE PETITIONERS' MAIN POINT IS THAT THEY WERE DISSATISFIED WITH THE LAW AS UNIVERSALLY ACCEPTED AND WITH THE CONSTITUTIONAL SAFEGUARD OF DUE PROCESS AND THE RIGHT TO TRIAL BY JURY AS APPLIED TO HUMPHREYS.

Apart from arguing for a change in American basic legal principles and for a change in our constitution, the petition presents no legal authority to justify its entertainment. If there is any deficiency in the Multidistrict Act as claimed by Petitioners, then the rem-

edy, if called for, may be supplied only by congress within constitutional limitations. Petitioners' real complaint is not that the law has been misapplied by the Court of Appeals, but that the law should be changed. Its discussion of class actions is similarly immaterial. There is no class action here involved.

II

THERE IS NO CONFLICT OF OPINION AMONG THE CIRCUIT COURTS OF APPEALS ON THE BASIC REQUIREMENTS OF THE COLLATERAL ESTOPPEL DOCTRINE. THIS COURT HAS CLEARLY STATED THE RULE.

None of the cases cited by the Petitioners under Point 2 of their brief in any way depart from this basic principle, they are neither in conflict with each other nor with the court below on this point. The *Kern* case, notwithstanding the selective quotation at p. 16, was concerned with the Federal Rules of Civil Procedure, which are not in issue here. The opinion of the Court of Appeals herein more than adequately disposes of the cases cited by the Petitioners. It stated its position as in agreement with the recent succinct summary of the law by this Court in the *Blonder-Tongue* case:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against

their position. (Citing cases)". (402 U.S. 313, 329).

See also *Rachal v. Hill,* 435 F.2d 59 (C.A. 5, 1970).

III

PETITIONERS HAVE FAILED TO CITE ANY ADDITIONAL GROUNDS

Petitioners have taken a wide scatter gun approach even resorting to inaccuracies. The transcript of the Downey trial is not a part of the record herein, as asserted by Petitioners at p. 6, nor was a copy ever served on Humphreys' counsel who has never seen it. Nor was it incumbent upon Humphreys' counsel to assume the burden of obtaining a copy of that costly transcript, analyzing it and showing how he would proceed with his own trial. As the Court of Appeals below observed. Humphreys' attorney proceeded on a different course. Humphreys' attorney did not take part in the Downey trial. He had no voice in the selections for use at trial from the voluminous depositions, transcripts and documentary evidence, nor in the selection and preparation of expert witnesses. He did not cross-examine witnesses. He made no arguments to the jury. This Court knows that jury trials oftentimes result in verdicts achieved as a result of the skill, strategy and advocacy of individual trial counsel. The Humphreys trial would have Tann as its only target. Whereas in Downey there were two co-defendants, with TWA as the natural target and Tann there for insurance. See *Healey v. American*

Airlines, (U.S.D.C.E.D. Ky., Swinford, D.J., April 1, 1970) in which this point was specifically recognized and collateral estoppel denied.

It should be noted that the *Waitkus* case, extensively discussed and relied upon by the Petitioners, pages 20-23, was reversed by the Supreme Court of Colorado, *Pomeroy v. Waitkus,* 517 P.2d 396, saying at p. 400, after citing the *Blonder-Tongue* case:

> "In our view, Pomeroy did not have his day in court when the trial court applied the doctrine of collateral estoppel in the first trial. And we agree with the statement of Chief Judge Silverstein in his dissenting opinion that although the policy of limiting litigation is sound, it should not be applied so as to deprive a party of procedural due process—the right of a full and fair opportunity to litigate the ultimate issue in the case—here, that of liability. *Waitkus v. Pomeroy,* supra."

CONCLUSION

There are no issues requiring this Court's attention. Wherefor it is respectfully submitted that the Petition for a Writ of Certiorari be denied with costs.

Respectfully submitted,

THEODORE E. WOLCOTT,

Attorney for Respondent.

March 26, 1974.